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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-397

SUSAN GARFINKLE, ET VIR.,
Appellants,

VS.

SUPERIOR COURT OF CONTRA COSTA COUNTY
(WELLS FARGO BANK, et al., Real Parties in Interest),
Appellees.

On Appeal from the Supreme Court
of the State of California

REPLY TO MOTION TO AFFIRM OR DISMISS

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ARGUMENT

**The State Actively Participates
In the Deprivation.**

Appellees completely miss the point of this appeal. We do *not* contest their argument that the mere "codification and curtailment of common law rights" is insufficient "state action," Motion at 2-6. The challenge here is to *an enforcement procedure that includes essential State participation*, without which the contractual power of sale would be useless under modern California property law. Most importantly, summary court process commands homeowners to

surrender possession of their property, and law enforcement officers carry out the physical eviction. At the very outset of the procedure, the county recorder clouds the homeowner's title; and the recorder subsequently perfects the involuntary change in title. Even the trustee, while ostensibly a "private" party, acts under a statutory compulsion to "fulfill the purpose of the trust," Civil Code § 2258. These and several other interrelated actions by the State are presented, with citations, in the Jurisdictional Statement at 12-20.

The opinion below recognizes that California's courts order the surrender of possession and that the recorder participates prior to the vesting of title. Appendix A at 6-8, 15-16. The appeal is required because the California Supreme Court failed to accord these and other factors the significance that is dictated by *Flagg Brothers, Inc. v. Brooks*, 98 S.Ct. 1729, 1734, 1736-1738 and nn. 10-12 (1978), and other authorities cited in the Jurisdictional Statement. Appellees quote from *Flagg Brothers'* discussions of (1) the public function theory and (2) the "mere acquiescence in a private action." Motion at 8-9. *We do not dispute the Court's holding that those two factors are insufficient state involvement* (although we note that Mr. Justices Stevens, White and Marshall dissented from that holding, and Mr. Justice Brennan did not participate). *Flagg Brothers* is pertinent here because of its authoritative explanation of why there was a right to Due Process in *Sniadach*, *Fuentes* and *North Georgia Finishing*. *Flagg Brothers* stressed that "state action" was present in those

cases because state officials or state process were involved in the physical deprivations of property, or because the authority of the State had been invoked to coerce the deprivations. The Court also stressed that "no state officials or process were ever involved in enforcing" the warehouseman's possessory lien rights. These critical factors are involved in California's nonjudicial foreclosure procedure, to a much greater degree than in *Sniadach* and *North Georgia Finishing*, where the only overt official act was the ministerial issuance of a writ by a court clerk. See Jurisdictional Statement at 12-16.

The cases cited by appellees for the "codification and curtailment" proposition are not in point.¹ Only a handful indicate that a public official or a court participates in any way. None of them had the benefit of *Flagg Brothers*, which provided the first analysis by this Court of "state action" in the field of creditor remedies. Neither the opinion below nor the overwhelming majority of appellees' cases even mentions the "state action" aspects of *Sniadach*, *Fuentes* or *North Georgia Finishing*. At a minimum, *Flagg Brothers'* explanation of those decisions raises substantial

¹Ten of the cases cited for that proposition do not purport to decide the "state action" question: *Lancaster Security Inv. Corp. v. Kessler*, 324 P.2d 634 (Cal.App. 1958); *Young v. Ridley*, 309 F.Supp. 1308 (D.D.C. 1970); *National Community Builders, Inc. v. Citizens & Southern Nat. Bank*, 207 S.E.2d 510 (Ga. 1974); *Ruff v. Lee*, 197 S.E.2d 376 (Ga. 1973); *Southern Mutual Inv. Corp. v. Thornton*, 206 S.E.2d 846 (Ga.App. 1974); *Maile v. Carter*, 17 Hawaii 49 (1905); *Roos v. Belcher*, 321 P.2d 210 (Ida. 1958); *Great Falls Nat'l Bank v. McCormick*, 448 P.2d 991 (Mont. 1968); *Britt v. Britt*, 215 S.E.2d 172 (N.C.App. 1975), appeal dismissed 217 S.E.2d 678; *Robinson v. McKinney*, 29 N.W. 658 (N.Dak. 1886).

questions about the correctness of the opinion below. *Flagg Brothers* was decided too late to be considered in that opinion, and the California Supreme Court summarily denied our petition for a rehearing to consider this Court's controlling pronouncements.

Appellees also make misleading references to three cases that were summarily disposed of by this Court. They assert that "In 1959 this Court dismissed an appeal and denied certiorari in *Lancaster Security Investment Corp. v. Kessler*, 358 U.S. 306, in which the precise question now before the Court was presented." Motion at 6 n*; see also *id.* at 4, stating that the lower court "found no state action." In fact, there is no mention at all of the "state action" doctrine in the lower court decision, 324 P.2d 634, and only one minor reference in the lengthy arguments presented to this Court. See briefs filed in Docket No. 521, October Term, 1958. Secondly, in *Federal National Mortgage Assn. v. Howlett*, appellees' entire argument was that "THE JUDGMENT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS." Docket No. 75-5081, Motion to Dismiss Appeal. And in *Levine v. Stein*, respondents argued that petitioners were barred by their failure to raise the constitutional issue in prior state litigation. Docket No. 77-760, Opposition at 9-12. Moreover, *Levine* involved commercial property, the trustee took possession before the sale, and there was no contention that any public official or court process was involved. See *id.*, Petition for Writ of Certiorari.

CONCLUSION

The California Supreme Court held that there is no right to Due Process even though State officers, courts and records participate in a statutory procedure that is used to deprive people of their homes. The need for Due Process is particularly great here, where appellants have made all payments required by the loan. They are threatened with foreclosure solely because they protested a bank policy, and the threat continues despite the California Supreme Court's ruling that an identical bank policy is illegal. See Jurisdictional Statement at 3-7.

The appellees ignore the issues raised by the Jurisdictional Statement and dwell instead upon propositions that are not contested. Their failure to confront our arguments underscores the substantiality of the questions. Those questions require plenary review by this Court or, alternatively, by the California Supreme Court in reconsidering its ruling in light of *Flagg Brothers*.

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Respectfully submitted,

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